

The judge relied primarily on MSHA computer-generated summaries of drilling accidents in underground metal-nonmetal mines during the years 1981-1984. Exhs. P-2 through P-5. These summaries cover a wide range of different drilling operations and it is impossible to determine from the brief descriptions in many of the summaries whether jackleg drilling was specifically involved in a given accident. Moreover, some of the accidents appear to have stemmed from incidents that may not have involved drilling at all. See, e.g., Exh. P-4, Items 1, 3, A, 5, 6 & 7. On the basis of evidence so lacking in substantive explanation, we cannot endorse the judge's virtual legislative determination that jackleg drilling is per se hazardous within the intentment of section 57.18-25. ^{4/}

Returning to our examination of the standard in light of the facts surrounding Lopez's drilling, we agree in result with the judge that Lopez was working "alone" as that term is used in section 57.18-25. 7 FMSHRC at 364-65. As discussed above, the three-man crew that included Lopez was divided between two worksites, stopes 17-3 and 17-4. Lopez was working in stope 17-3 while the other two members of the crew, Herrera and Varela, were assigned to stope 17-4. The distance between the stopes was approximately 50-60 feet, and travel between the stopes required climbing up one ladderway and down another. Under these circumstances, we conclude that "for practical purposes" Lopez was working alone in the particular work area to which he was assigned. See Old Ben, 4 FMSHRC at 1802. (As previously noted, such an assignment is not forbidden by the standard and does not, by itself, imply any violation of the standard.)

For purposes of this decision only, we will assume that specific hazardous conditions existed in connection with Lopez's work and turn to the crucial issue of whether Lopez had sufficient contact with other miners. In establishing in Old Ben a test under which such contact issues could be resolved, the Commission rejected approaches either

^{4/} The judge also relied upon the testimony of the inspector who issued the citation. Without detracting from the inspector's qualifications as a general expert in mine health and safety, we note his statement that he had never operated a jackleg drill (Tr. 60), his candid admission that he was not an expert on drilling (Tr. 61), and his apparent misconceptions as to the general meaning of the cited regulation. Tr. 14-16. We further note that because of its age, the judge expressed some doubt as to the weight to be accorded Exh. P-1, a 1975 report on jackleg drilling prepared by MSHA's predecessor agency, MESA, based on data for the years 1973-74. 7 FMSHRC at 362. The judge assigned weight to the report largely on the basis of the subsequently prepared MSHA computer summaries but, for the reasons discussed above, we cannot conclude that these summaries lend weight to the older MESA report. Finally, some evidence was presented that the practice of Cotter and the Industry is to have miners operate jackleg drills in pairs. However, the evidence in this record falls short of establishing that any such industry norm exists or whether any such practice is founded primarily on safety or production considerations.